

**Remarks for Assembly Committee on Judiciary & Ethics**

*Regarding AB 372 – Legal Fee Recovery*

By Representative Donald Friske

*June 7, 2007*

Thank you Chairman Gundrum and Committee members. I appreciate your hearing today and scheduling this bill for your consideration.

Under current law, all Wisconsin citizens, non-profit corporations and businesses may petition a court to recover legal fees when they successfully defend themselves against a *civil* lawsuit.

Also, under current law, the statutes allow *certain* Wisconsin citizens, small non-profit corporations and small businesses to petition a court to recover legal fees when they successfully defend themselves in State administrative agency actions.

- Wisconsin citizens: only those with a gross income less than \$150,000 may petition
- Small non-profits: only those with “fewer than 25 full-time employees”
- Small businesses: only those with “25 or fewer full-time employees or which has gross annual sales of less than \$5,000,000”

Under this bill, all financial and size limitations would be eliminated, thus allowing anyone who successfully defends themselves in a state administrative agency action to petition for the recovery of legal fees.

AB 372 will provide both average citizens and corporations an equalizing mechanism to recover legal fees when the State of Wisconsin frivolously pursues legal action against them.

A petition for the recovery of legal fees is not an automatic award to successful defendants. Motions must be argued by the petitioners and may be contested by the agencies. The administrative law judge then may either grant the motions or deny the motions on the legal basis of the agency’s original citation.

The Fiscal Bureau has completed a survey of State Agencies to determine how such a provision will impact them. The result of the survey, provided to you as an enclosure with my testimony today, states there will not be a large fiscal impact on the State of Wisconsin. The most expected impact would have agency lawyers spend more time than they currently do in court.

This bill does not automatically require the government to reimburse defendant legal fees. A defendant would be required to file a motion for the recovery of fees and be able to prove the government was unreasonable in its attempts to take the individual or corporation to court.

Thank you for hearing this bill today and I will be glad to answer any questions the committee has for me.

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## Legislative Fiscal Bureau

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November 30, 2006

TO: Representative Donald Friske  
Room 312 North, State Capitol

FROM: Bob Lang, Director

SUBJECT: LRB 0008/P1: Recovery of Costs by Private Parties in Civil Litigation or Administrative Proceedings Involving State Agencies

At your request, this memorandum provides: (a) a description of the rights of private parties under current law to recover legal costs in certain administrative and court proceedings involving state agencies under ss. 227.485 and 814.245 of the statutes; (b) a description of the provisions of LRB 0008/P1 which would modify current law relating to recovery of legal costs; and (c) a fiscal and workload estimate of the possible impact of the provisions of LRB 0008/P1 on state agencies. A copy of LRB 0008/P1 is attached.

### Current Law

*Administrative Proceedings.* Under s. 227.485 of the statutes, if an individual (making less than \$150,000 annually in federal adjusted gross income), a small nonprofit corporation or a small business prevails in an administrative proceeding against a state agency, the hearing examiner must reimburse the private party for eligible costs incurred in connection with the proceeding (if a motion for costs is filed), unless the hearing examiner finds either: (a) that the state agency was "substantially justified" in taking its position; or (b) that special circumstances exist that would make the award unjust. If a hearing examiner awards costs to a private party, the cost award is generally subject to judicial review.

*Judicial Proceedings.* Under s. 814.245 of the statutes, if an individual (making less than \$150,000 annually in federal adjusted gross income), a small nonprofit corporation or a small business prevails in any court action brought by a state agency (or whose cost award in an administrative proceeding has been appealed to a court for judicial review), such a private party must be reimbursed for eligible costs incurred in the relevant proceeding unless the court finds either: (a) that the state agency was "substantially justified" in taking its position; or (b) that special circumstances exist that would make the award unjust.

*Definitions and Related Provisions.* Under both statutory sections, in order for a state agency

to have been "substantially justified" in taking its position, its position must have had a "reasonable basis in law and fact." Under both statutory sections, only the following types of private parties are qualified to recover eligible costs: (a) an individual whose properly reported federal adjusted gross income (whether filing individually or in combination with a spouse) was less than \$150,000 in each of the 3 calendar years or corresponding fiscal years immediately prior to the commencement of the action; (b) a business entity, including its affiliates, employing 25 or fewer full-time employees or having gross annual sales of less than \$5,000,000; and (c) a nonprofit corporation employing fewer than 25 full-time employees. Finally, in interpreting both statutory sections, state courts are directed to be guided by federal case law, as of November 20, 1985, interpreting substantially similar provisions under the federal Equal Access to Justice Act.

*Frivolous Private Party Motions for Costs.* If a hearing examiner in an administrative proceeding, or a judge in a court proceeding, finds that a prevailing private party's motion for costs is frivolous, the hearing examiner or judge may award the state agency all reasonable costs in responding to the motion. In order to find that a private party's motion for costs was frivolous, however, the hearing examiner or judge must find either that: (a) the motion was submitted in bad faith, solely for purposes of harassing or maliciously injuring the state agency; or (b) the private party or the private party's attorney knew, or should have known, that the motion was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

#### **Provisions of LRB 0008/P1**

The provisions of LRB 0008/P1 would eliminate the restrictions under current law limiting the types of private parties eligible to recover costs against state agencies under ss. 227.485 and 814.245 of the statutes to: (a) certain individuals earning less than \$150,000 annually of federal adjusted gross income; (b) certain small businesses; and (c) certain small nonprofit corporations. Instead, any private party prevailing in a qualifying court action or administrative proceeding could recover eligible costs from the state agency unless either: (a) the state agency was substantially justified in taking its position; or (b) special circumstances existed that would make the award unjust.

#### **Fiscal and Workload Effect Associated with LRB 0008/P1**

In order to determine the possible fiscal and workload effect of implementing LRB 0008/P1, state agencies were surveyed regarding: (a) their experience under current law; and (b) the possible impact of implementing the concepts contained in the draft. Based on the survey, over the past three completed state fiscal years state agencies have closed approximately 7,100 court cases and an additional 2,500 administrative cases annually. These caseload figures should be viewed as estimates only, as: (a) in a number of cases state agencies provided estimates of caseload; (b) other state agencies provided yearly caseload averages; (c) some agencies provided caseload data on a calendar year basis; (d) some agencies aggregated their administrative and court caseloads; and (e) complete caseload data was not received from all state agencies.

Of the approximately 9,600 administrative and court cases closed annually, it is not possible to determine the percentage of cases in which private parties may not recover costs against state agencies under current law, as the income or the number of employees of a private party will often not be relevant in a proceeding until a private party files a motion for costs. There may be many cases in which prevailing private parties are qualified to file motions for costs against state agencies under current law, but choose not to file such motions. [Even if a prevailing private party is qualified to file a motion for costs under current law, the prevailing private party may choose not to file such a motion concluding that the hearing examiner or judge will find either that: (a) the state agency was substantially justified in taking its position; or (b) special circumstances exist that would make the award unjust.] An important factor in the ultimate fiscal and workload impact of the proposed changes under LRB 0008/P1, will be the additional percentage of private parties who would now qualify to file motions for costs against state agencies.

Based on the survey of state agencies, a number of common themes were raised. While state agencies do not anticipate that they will lose many motions for costs under ss. 227.485 and 814.245 of the statutes if the provisions of the draft are adopted, a number of agencies, large and small, expressed the concern that they could be subject to many more motions for costs if the draft is enacted. State agencies expressed the concern that these increased motions for costs could be a drain on agency resources. State agencies also pointed out that while it is difficult to predict the fiscal impact of the draft's provisions, losing a cost motion in a single complex and involved case could expose an agency to paying significant legal costs (possibly hundreds of thousands of dollars).

A number of state agencies also expressed the concern that wealthier private parties, including larger businesses, could be more aggressive in filing motions for costs if they prevailed against the state. These state agencies expressed the concern that wealthier private parties could file (or threaten to file) such motions for costs to intimidate state agencies into not enforcing state statutes and administrative provisions. On the other hand, others could argue that permitting all private parties to file motions for costs if they prevailed could encourage state agencies to make careful use of administrative and court proceedings to resolve disputes.

Due to the difficulty of determining the number of additional private parties who would be permitted to file motions for costs if the provisions of the draft were adopted, and given the lack of history with these proposed changes, no state agency identified a specific fiscal estimate as to the possible cost of the provisions of LRB 0008/P1. Nonetheless, what follows is a summary of the responses from those agencies with generally more sizable administrative and court caseloads.

*Department of Justice.* The Department of Justice (DOJ) has primary responsibility for representing state agencies in civil court actions. Over the past three completed state fiscal years, DOJ closed approximately 6,100 court cases, and an additional 400 administrative cases annually. Department staff does not recall any recent case in which it was ordered to pay costs to a prevailing private party. The Department does not believe that permitting all prevailing private parties to file motions for costs against state agencies under LRB 0008/P1 would lead to significant cost awards

against DOJ. [Department staff believes that DOJ would generally prevail in private party motions for costs as it believes that hearing examiners and judges would normally find that it had been substantially justified in taking its position.] The Department did express the concern, however, that this change could lead to significant additional state cost to defend against private party motions for costs that would ultimately be denied. ✓

*Department of Health and Family Services.* Over the past three completed state fiscal years, the Department of Health and Family Services (DHFS) closed approximately 780 court cases, and an additional 530 administrative cases annually. During this time, DHFS averaged six cases annually in which it had to pay prevailing private parties for their legal costs, and paid an average of \$4,000 per case in reimbursed private party legal costs. Department legal staff believes that the proposed changes under the draft could lead to more motions for costs which, in turn, could increase the need for agency legal resources to address the motions. The Department does not believe that the provisions of the draft would lead to significant additional awards to prevailing private parties for legal costs. }

*Department of Administration.* During calendar year 2004, the Department of Administration (DOA) closed 300 administrative cases and during calendar year 2005, the Department closed 328 administrative cases. During this two year period, DOA was not ordered to make any payments to prevailing private parties for their legal costs. Department staff does not believe that the provisions of the draft would lead to significant additional fiscal or workload impacts to the agency. ✓

*Office of the Commissioner of Insurance.* Over the last three completed state fiscal years, the Office has closed on average approximately 300 administrative cases a year. In none of the 933 cases closed over the last three years was the Office ordered to pay costs to a prevailing private party. The Office did not identify any fiscal or workload concerns associated with the provisions of LRB 0008/P1. ✓

*Department of Regulation and Licensing.* Based on data provided by the Department, during the last two completed calendar years, the Department of Regulation and Licensing (DRL) closed an average of 300 court and administrative cases annually. Department staff could not recall any instance in the last three years in which DRL was ordered to pay costs to a prevailing private party. Agency staff expressed the concern that adopting the provisions of the draft would lead more private parties to file motions for costs and create significant additional work for Department staff to respond to such cost motions. ✓

*Department of Commerce.* Over the last three completed calendar years, the Department of Commerce has closed an average of 275 administrative cases annually and one additional court case annually. In 2006, the Department did have one case in which a prevailing private party was awarded costs of approximately \$500. Commerce estimates that the provisions of LRB 0008/P1 would have only a minimal fiscal and workload impact on the agency. ✓

*Department of Agriculture, Trade & Consumer Protection.* Over the last three completed state fiscal years, the Department of Agriculture, Trade & Consumer Protection (DATCP) has closed on average 140 court cases and an additional 60 administrative cases annually. In addition, during the same period district attorney offices and the Department of Justice have closed approximately 125 referred DATCP cases annually. (According to DATCP staff, most of these cases were referred to district attorney offices.) During this time period, there was one court case in 2003-04, and one court case in 2004-05, in which the prevailing private party was awarded costs. In 2003-04, the prevailing private party was awarded \$30,000 in costs, while in 2004-05, the prevailing private party was awarded approximately \$14,000 in costs.

Department staff expressed the concern that the provisions of the draft could have a substantial fiscal and workload impact to the agency. They expressed the concern that the draft could expand the number of private parties eligible to file motions for costs. Staff expressed the concern that in a single large case, legal costs for a prevailing private party could total hundreds of thousands of dollars. The Department expressed the further concern that the proposed changes could require DATCP staff to spend more time litigating cost motions.

*Department of Financial Institutions.* Based on information provided by the Department of Financial Institutions (DFI), DFI closed approximately 200 administrative and court cases annually during each of the last two completed state fiscal years. Over the last three completed state fiscal years, the Department was not ordered in any administrative or court proceeding to pay costs to a prevailing private party. Department staff did not identify any fiscal or workload impact to the agency associated with the proposed changes under the draft.

*Public Service Commission.* Based on information provided by the Public Service Commission (PSC), it is estimated that, on average, the PSC closes approximately 50 administrative cases and an additional 20 court cases annually. Public Service Commission staff did not identify any recent case in which the PSC was ordered to pay a prevailing private party's legal costs. The agency did not identify any fiscal or workload impact to the agency associated with the proposed changes under the draft.

*Department of Transportation.* Based on data provided by the Department of Transportation (DOT), it is estimated that, on average, DOT closes approximately 34 court cases and an additional 27 administrative cases annually. [These estimates do not include the Department's eminent domain caseload for which a prevailing private party's legal costs would be awarded under a separate statutory section.] Department staff indicates that it is unclear what fiscal or workload effect, if any, the provisions of the draft would have on DOT.

*Department of Natural Resources.* Over the last three completed state fiscal years, the Department of Natural Resources (DNR) closed, on average, 21 administrative cases and an additional 13 court cases annually. The court cases primarily involved small claims court cases involving forest fire suppression under Chapter 26 of the statutes. During the last three completed state fiscal years, DNR was not ordered to pay legal costs to any prevailing private party. The

Department estimates that if the provisions of the draft were to be adopted: (a) it could face more motions for costs as more private parties would be eligible to file such motions; (b) more cost motions could divert DNR resources from its other responsibilities; and (c) while the Department expects that it would regularly prevail in such cost motions as it has under current law, were it to lose such a cost motion its fiscal exposure would depend on the complexity of the case in which it lost.

*Department of Revenue.* Based on information provided by the Department of Revenue (DOR), approximately 19 tax cases a year are resolved through appeal to the Wisconsin Tax Appeals Commission or through court action. During the last three completed state fiscal years, DOR was not ordered, either by the Tax Appeals Commission or by the courts, to pay legal costs to any prevailing private party. Department staff has not identified any fiscal or workload concerns associated with permitting all prevailing private parties to move for legal costs against state agencies.

*Department of Workforce Development.* The Department of Workforce Development (DWD) indicates that the provisions of the draft could have a modest fiscal and workload impact to DWD regarding its apprenticeship, migrant labor, and vocational rehabilitation programs. Some of the Department's legal actions under these programs affect larger businesses which, under current law, are not permitted to seek costs against the state if they prevail. Given the small number of cases under these programs, however, DWD does not believe that the provisions of the draft would ultimately have a significant fiscal or workload impact to the agency.

The Department does not believe that the provisions of LRB 0008/P1 would have a significant fiscal and workload effect on its administrative and court caseload involving: (a) DWD employee cases brought before the Wisconsin Employment Relations Commission; and (b) administrative cases contesting a W-2 sanction. Under current law, most prevailing private parties in these latter types of cases already have the right to file a motion for costs if they prevail against DWD.

*University of Wisconsin System.* System staff indicates that the provisions of the draft would have no significant fiscal or workload effect for the University of Wisconsin System.

*Department of Public Instruction.* The Department indicates that the provisions of LRB 0008/P1 would have minimal fiscal or workload effect to the agency as the agency believes that private parties involved in administrative or court proceedings with the agency under current law already have the right to file motions for costs (i.e., these private parties are generally small businesses, small nonprofit corporations, or individuals making less than \$150,000 annually).

I hope this information is of assistance.

PO/sas  
Attachment



## PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1 AN ACT *to repeal* 227.485 (2) (b), (c) and (d), 227.485 (7), 814.245 (2) (a), (b) and  
2 (c) and 814.245 (8); and *to amend* 106.20 (1) (f), 227.485 (3), 227.485 (6) and  
3 814.245 (3) of the statutes; **relating to:** awarding costs in administrative  
4 agency actions.

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***Analysis by the Legislative Reference Bureau***

Under current law, if an individual, small nonprofit corporation, or a small business is the prevailing party in an administrative agency contested case, in an action brought by an agency, or in a judicial review proceeding under s. 227.485 (6), that prevailing party is entitled to an award of costs unless the court finds the agency was substantially justified in taking its position or if such an award would be unjust under the circumstances. If the prevailing party is an individual, that party is not entitled to recover costs if the party's federal adjusted gross income was \$150,000 or more in each of the three years prior to the commencement of the action.

This bill eliminates financial and entity size limitations for prevailing parties to be eligible to receive costs in administrative agency actions, allowing an award of costs to all persons who are prevailing parties unless the court finds the agency was substantially justified in taking its position or if such an award would be unjust under the circumstances.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

1           SECTION 1. 106.20 (1) (f) of the statutes is amended to read:

2           106.20 (1) (f) "~~Small business~~" ~~has the meaning given in s. 227.485 (2) (c) means~~  
3           a business entity, including its affiliates, which is independently owned and  
4           operated, and which employs 25 or fewer full-time employees or which has gross  
5           annual sales of less than \$5,000,000.

6           SECTION 2. 227.485 (2) (b), (c) and (d) of the statutes are repealed.

7           SECTION 3. 227.485 (3) of the statutes is amended to read:

8           227.485 (3) In any contested case in which ~~an individual, a small nonprofit~~  
9           ~~corporation or a small business~~ a person other than the state is the prevailing party  
10          and submits a motion for costs under this section, the hearing examiner shall award  
11          the prevailing party the costs incurred in connection with the contested case, unless  
12          the hearing examiner finds that the state agency which is the losing party was  
13          substantially justified in taking its position or that special circumstances exist that  
14          would make the award unjust.

15          SECTION 4. 227.485 (6) of the statutes is amended to read:

16          227.485 (6) A final decision under sub. (5) is subject to judicial review under  
17          s. 227.52. If the ~~individual, small nonprofit corporation or small business~~ a person  
18          other than the state is the prevailing party in the proceeding for judicial review, the  
19          court shall make the findings applicable under s. 814.245 and, if appropriate, award  
20          costs related to that proceeding under s. 814.245, regardless of who petitions for

1 judicial review. In addition, the court on review may modify the order for payment  
2 of costs in the final decision under sub. (5).

3 **SECTION 5.** 227.485 (7) of the statutes is repealed.

4 **SECTION 6.** 814.245 (2) (a), (b) and (c) of the statutes are repealed.

5 **SECTION 7.** 814.245 (3) of the statutes is amended to read:

6 814.245 (3) Except as provided in s. 814.25, if ~~an individual, a small nonprofit~~  
7 ~~corporation or a small business~~ a person other than the state is the prevailing party  
8 in any action by a state agency or in any proceeding for judicial review under s.  
9 227.485 (6) and submits a motion for costs under this section, the court shall award  
10 costs to the prevailing party, unless the court finds that the state agency was  
11 substantially justified in taking its position or that special circumstances exist that  
12 would make the award unjust.

13 **SECTION 8.** 814.245 (8) of the statutes is repealed.

14 **SECTION 9. Initial applicability.**

15 (1) The treatment of sections 106.20 (1) (f), 227.485 (3), 227.485 (6), and 814.245  
16 (3) of the statutes and the repeal of sections 227.485 (2) (b), (c), and (d), 227.485 (7),  
17 814.245 (2) (a), (b), and (c), and 814.245 (8) of the statutes first applies to  
18 administrative agency contested cases, actions by a state agency and judicial review  
19 proceedings under s. 227.485 (6), commenced on the effective date of this subsection.

20 **SECTION 10. Effective date.** This act takes effect on the first day of the 4th  
21 month beginning after publication.

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